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# In the Supreme Court of the United States

OCTOBER TERM, 1995

BARBARA A. DE BUONO, NEW YORK STATE COMMISSIONER OF HEALTH, ET AL., PETITIONERS

*v.*

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, ETC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether a state tax on the "gross receipts received from all patient care services and other operating income" of hospitals licensed to operate in the State "relate[s] to" employee welfare benefit plans within the meaning of Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), and is thus preempted, insofar as the tax applies to the income of medical centers owned and operated by an ERISA plan.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

## STATEMENT

1. In 1990, New York State enacted a tax, known as the Health Facility Assessment (HFA), in order to raise revenue and avoid reductions in the State's Medicaid program. Pet. App. 7a; C.A. App. 46, 51, 56, 59. With certain exceptions not relevant here, the assessment is imposed on all "[h]ospitals" operating in the State. The statute defines the term "hospital" to include a broad range of facilities that provide

health care services under the supervision of a physician or dentist, and expressly encompasses a "diagnostic center" and a "treatment center." N.Y. Pub. Health Law §§ 2801(1), 2807-d(1)(a) (McKinney 1993). The assessment is calculated as a percentage of the hospital's "gross receipts received from all patient care services and other operating income." *Id.* § 2807-d(1)(a).[1] The percentage differs for three types of hospitals, see *id.* § 2807-d(2)(a) to (c), but is assessed at 0.6% for diagnostic and treatment centers.

The law requires hospitals to make monthly payments of the assessment to the health commissioner or her designee, who remits the accumulated monies to the State's general fund. N. Y. Pub. Health Law § 2807-d(1)(a), (5), (7)(d) and (9) (McKinney 1993); see C.A. App. 60. Hospitals must also submit quarterly reports, and a certified annual report, of their gross receipts that are subject to the tax. N.Y. Pub. Health Law § 2807-d(7)(a) and (b) (McKinney 1993); see C.A. App. 60.

2. Respondents are the trustees of the NYSA-ILA Medical and Clinical Services Fund (Fund). The

[1] Receipts from "patient care services" refers to "all monies received for or on account of hospital or health-related services," including preadmission, out-patient, in-patient, and post discharge care, and items such as nursing service, ambulance service, laboratory service, medical social service, drugs, supplies, and room and board. N.Y. Pub. Health Law §§ 2801(4)(a) and (b), 2807-d(3)(c) (McKinney 1993). "Operating income" includes "monies received for or on account of such revenue sources as investment income, parking lots, cafeterias, gift shops and rental income," with certain exclusions. N.Y. Pub. Health Law § 2807-d(3)(d) (McKinney 1993); see C.A. App. 65.



Fund is a labor-management trust governed by Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. 186. The Fund was established pursuant to an Agreement and Declaration of Trust and Plan and collective bargaining agreements between the New York Shipping Association, Inc., and the International Longshoremen's Association covering longshore employment in the Port of New York and New Jersey. Pet. App. 7a; C.A. App. 19. The Fund administers a self-insured, ERISA-covered multi-employer welfare benefit plan, see 29 U.S.C. 1002(1) and (37); 26 U.S.C. 414(f), that provides medical, dental and other health services on an outpatient basis through three medical centers that it owns and operates. Pet. App. 7a. The two centers at issue here are located in New York and are licensed by the State to operate as diagnostic and treatment centers. Pet. 4; see N.Y. Pub. Health Law § 2805 (McKinney 1993); C.A. App. 43, 57, 83.

The centers principally serve longshore workers and retirees (and their dependents) whose labor contracts entitle them to receive health care at the centers. C.A. App. 78. The centers also provide services to members of other ILA locals who are employed by non-longshore employers ("outside employers") and whose contracts also entitle them to health care at the centers, *ibid.*; to members of the Port Police and Guards Union (PPGU) which, through its own ERISA-covered welfare plan (the NYSA-PPGU Welfare Fund), contracts with the NYSA-ILA Fund for the treatment of its members on a fee-for-service basis at the centers, C.A. App. 79, 81; and to local union officers and employees, *ibid.*

The centers receive income from a variety of sources. First, they receive payments directly from

Fund participants for annual registration fees and prescription co-payments. C.A. App. 76, 82, 143-144. Second, they receive payments from workers' compensation insurance carriers for services rendered to Fund participants injured on the job. C.A. App. 76, 82. Third, each of the centers receives contributions from nearby employers calculated on the basis of hours worked by Fund participants, as provided by labor contracts.[2] C.A. App. 76, 81. Fourth, the centers receive payments from the NYSA-PPGU Welfare Fund for services rendered to its participants on a fee-for-service basis. *Ibid.* Under the New York law, all of those categories of income constitute receipts from patient care services, and the HFA has been assessed against them. A fifth category of income—weekly remittances from the Fund for operating expenses on an as-needed basis—has not been subject to the assessment. C.A. App. 80.[3]

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[2] Although some employers send their contributions directly to the closest medical center, others (especially those who operate at more than one location) send their contributions to the Fund, which in turn funnels the money on an as-needed basis to the medical centers. C.A. App. 80-81; see note 3, *infra*.

[3] The remittances derive from employer contributions for Fund participants and contributions for local union officers and employees based on hours of work. C.A. App. 80-81. The Fund maintains that those remittances are akin to a grant that is non-assessable income under the New York law, Pet. 4 (citing C.A. App. 84), and the State has not attempted to apply the HFA to those monies. Pet. App. 8a; see *id.* at 13a. The assessability of remittances from the Fund to the centers is therefore not at issue in this case. *Id.* at 8a. Application of the assessment to operating income derived from such activities as records reproduction fees, which respondents do not challenge, is also not at issue. *Id.* at 9a.



From January through November 1991, the centers filed reports and paid the 0.6% assessment applicable to diagnostic and treatment centers on revenues the centers received for patient care services. Pet. App. 8a; see C.A. App. 143, 138.[4] Thereafter the Fund placed its assessments into escrow and ceased filing reports. Pet. App. 8a; C.A. App. 21-22. Beginning in 1992, payment of registration fees by Fund participants and service fees by the NYSA-PPGU Welfare Fund was redirected to the Fund instead of to the centers. Pet. App. 8a; C.A. App. 86.

3. In 1992 respondents brought this action to invalidate and enjoin enforcement of the HFA on the ground that it is preempted by Section 514(a) of ERISA, 29 U.S.C. 1144(a), "insofar as [the HFA] imposes a levy on contributions and payments for health care benefits provided by the Fund." Pet. App. 9a.[5] ERISA's preemption clause provides that ERISA supersedes all state laws that "relate to" an ERISA plan. 29 U.S.C. 1144(a).

On cross motions for summary judgment, the district court held that ERISA does not preempt the HFA.[6] Pet. App. 19a. Relying on *Aetna Life Ins. Co.* v. *Borges*, 869 F.2d 142 (2d Cir.), cert. denied, 493 U.S. 811 (1989), the court reasoned that the HFA is a tax law of general application because "it is not specifi-

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[4] For that period, the Fund paid $7,066 on assessable income of $1,177,670 (patient receipts and operating income). Pet. App. 8a; C.A. App. 84-85.

[5] Petitioners also sought "compensatory damages equal to the amounts paid to" the State, plus interest, costs and fees. C.A. App. 23.

[6] The district court did not reach the State's defenses under the Tax Injunction Act, 28 U.S.C. 1341, and the Eleventh Amendment. Pet. App. 19a.

cally directed at ERISA plans but applies to all health care facilities." Pet. App. 21a. The court observed that the tax "does not interfere with the calculation of benefits" or with "the determination of an employee's eligibility for benefits," and that the HFA's "impacts on benefit plans are incidentally economic resulting only in the need for administrative and accounting procedures to comply with the law." *Ibid.* The court also concluded that the economic impact of the 0.6% assessment is not substantial. *Id.* at 22a.

4. The court of appeals reversed. Pet. App. 6a-14a. It rejected the district court's conclusion that the HFA statute is a law of general application, because the HFA "does not apply broadly to every sector of society" in the State, but rather "targets only the health care industry," which, "by definition, [is] the realm where ERISA welfare plans must operate." *Id.* at 12a. Because the HFA "operates as an immediate tax on payments and contributions which were intended to pay for participants' medical benefits," the court stated, it "directly affects the Fund in its principal role" as a provider of health care benefits to plan participants and beneficiaries. *Ibid.* The court thus concluded that the HFA "relates to" the Fund because it "depletes those assets earmarked for the provision of health care benefits," and would cause the plan either to reduce benefits or increase charges. *Ibid.* In the court's view, those consequences would "detrimentally affect the central mission and purpose of the Fund," and therefore are not "remote or tenuous." *Ibid.*

Further, the court stated, it makes no difference that the Fund could avoid the HFA by "restructuring its finances so that funds formerly remitted by plan participants and employers directly to the medical



centers would be remitted to the Fund which would subsequently transfer them to the centers"; in the court's view, state laws "that force plans to change their traditional methods of administration or to adopt different methods on a state-by-state basis" are preempted by ERISA. Pet. App. 13a. Finally, the court concluded, a state law does not escape ERISA preemption merely because its economic impact on ERISA plans is de minimis. *Id.* at 14a.

5. This Court granted the State's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of its intervening decision in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995). Pet. App. 5a. The Court in *Travelers* held that New York statutes imposing 9%, 11%, and 13% surcharges on hospital care paid for by health maintenance organizations and commercial insurers did not "relate to" ERISA plans within the meaning of Section 514(a), and thus were not preempted. 115 S. Ct. at 1674. Determining that the surcharge statutes did not "make 'reference to'" ERISA plans, the Court analyzed whether they nevertheless had a "connection with" the ERISA plans. *Id.* at 1677; see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). The Court observed that ERISA preempts state laws that "mandate[] employee benefit structures or their administration" or "provid[e] alternative enforcement mechanisms" for ERISA claims. 115 S. Ct. at 1678. Unlike those effects, the Court reasoned, the surcharge statutes had only "an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 1679. The Court noted that the surcharge statutes did not "bind plan administrators

to any particular choice and thus function as a regulation of an ERISA plan itself." *Ibid.* Nor, the Court reasoned, did the "indirect influence of the surcharges preclude uniform administrative practice or the provision of a uniform benefit package." *Ibid.* While the surcharges bore "on the costs of benefits," the Court concluded, *ibid.*, they did not produce such an "acute" economic effect "as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers," *id.* at 1683.

6. On remand from this Court, the Second Circuit adhered to its original decision in this case. Pet. App. 1a-4a. The court of appeals observed that the surcharges in *Travelers* were imposed not "on ERISA plans themselves, but on insurance carriers providing health insurance coverage to the plans and their beneficiaries." *Id.* at 3a. Those surcharges, the court stated, "raised costs to the patient, who remained liable for the balance of any bill" not paid by insurance or an ERISA plan. *Ibid.* Accordingly, the court stated, the surcharges "operat[ed] as an indirect source of merely economic influence" on plan decisions. *Ibid.*, quoting *Travelers*, 115 S. Ct. at 1680. The court distinguished the HFA on the ground that "there is no third party between the plan and the tax imposed pursuant to the HFA," so that the HFA "depletes the Fund's assets directly." Pet. App. 3a-4a. Thus, the court concluded, "[n]othing in *Travelers* undermines our reliance on the HFA's direct economic impact upon the Fund as a basis for finding ERISA pre-emption nor precludes a determination that a state law's direct economic impact on ERISA



plans is sufficient for a finding of pre-emption." *Id.* at 4a.[7]

## DISCUSSION

The court of appeals erred in holding that, when an ERISA plan chooses to engage in an economic activity in which a very broad group of other entities also engages and which is traditionally subject to state regulation, the plan is immune from state taxes that are imposed on that activity. The logic of that holding is inconsistent with this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), and with the decision of the Eighth Circuit in a recent, post-*Travelers* case. For that reason, and because the decision below may have a serious impact on the ability of States in the Second Circuit to impose even-handed taxes and regulatory requirements on health care providers, further review by this Court is warranted.

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[7] The court of appeals' analysis on remand in the instant case was foreshadowed by its decision on remand in *Travelers*. This Court had remanded the case to the court of appeals to determine whether the 13% surcharge applicable to hospital bills incurred by members of "self-insured funds" was pre-empted. 115 S. Ct. at 1675 n. 4. On remand, the Second Circuit held that the 13% surcharge did not relate to "self-insured funds." *Travelers Ins. Co.* v. *Pataki*, 63 F.3d 89, 93-94 (1995). The court distinguished the HFA from the 13% surcharge on the ground that the HFA directly depletes plan assets, whereas self-insured plans are "not directly liable for the surcharge." *Id.* at 94. The court questioned, however, whether it "should continue to distinguish between laws that directly deplete ERISA plans' assets and laws that only indirectly do so." *Ibid.* In the court's decision on remand in the instant case, it did not cite to its remand decision in *Travelers*.

1. The Second Circuit held that the New York tax "relates to" the NYSA-ILA plan within the meaning of Section 514(a) of ERISA because the NYSA-ILA plan, as the owner of the medical center on which the tax is imposed, must directly pay the tax to the State. See Pet. App. 3a ("there is no third party between the plan and the tax"). That holding is inconsistent with the reasoning of this Court's decision in *Travelers*.[8]

First, the surcharge statutes upheld in *Travelers* and the tax at issue here are both "generally applicable statute[s]" that operate in an area of traditional state regulation and that "make[] no reference to, [and] indeed function[] irrespective of, the existence of an ERISA plan." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990).[9] The tax applies to all

[8] The United States stated in its amicus curiae brief at the petition stage in *Travelers* that "[a]pplication of the 13% surcharge to 'self-insured funds' *may* raise some distinct issues," not that it necessarily "*would* present entirely distinct issues," as respondents assert (Br. in Opp. 6 n.4; emphasis added). See Brief for the United States as Amicus Curiae at 14 n.5 in Nos. 93-1408, 93-1414 and 93-1415 (filed Sept. 14, 1994) (emphasis added); accord Brief for the United States as Amicus Curiae Supporting Petitioners at 12 n.3 in Nos. 93-1408, 93-1414 and 93-1415 (filed Nov. 15, 1994). The distinct issue we had in mind—but which was not before the Court—was whether the 13% surcharge payable by "self-insured funds" (but not other favored payors like Blue Cross/Blue Shield) singled out self-insured plans for special treatment and thus "relate[d] to plans" for that reason. Here, no such distinct analysis is necessary because the tax applies to hospitals generally and is entirely neutral with respect to ERISA plans.

[9] The HFA does not "refer to" ERISA plans. Indeed, if the HFA did expressly exempt plan-owned hospitals from the tax, which is the result respondents seek to achieve in this litigation, the exemption would be preempted as a law that "singles out ERISA employee welfare benefit plans for different treatment." See *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 830, 838 n.12 (1988).



"hospitals" without regard to their ownership, their patient composition, or the ultimate source of patient revenues subject to the tax. Similarly, the surcharge statutes upheld in *Travelers* affect the hospital bills of all entities that pay for hospital care without regard to whether the payor is an ERISA plan, a commercial insurer, or a health maintenance organization. In both contexts, the state law has an effect on ERISA plans only because, and to the extent that, plans have chosen to engage in economic activity that is covered by the generally applicable law. That effect is "too tenuous, remote, or peripheral" to warrant a finding that the law "relate[s] to" ERISA plans. *Travelers*, 115 S. Ct. at 1680; *Shaw*, 463 U.S. at 100 n.21.

Second, the economic impact of the surcharge statutes in *Travelers* and the HFA on plans is the same. They both increase the cost of hospital care. Moreover, the increased cost resulting from both laws is paid from the accumulation of participant and employer contributions for plan benefits. Yet this Court in *Travelers* held that that sort of draw on plan assets does not suffice for preemption. See *Travelers*, 115 S. Ct. at 1679, 1681.

Third, application of other factors that the Court identified in *Travelers* as legally relevant to whether a state law "relate[s] to" ERISA plans reinforces the conclusion that the HFA is not preempted. The provider tax does not "mandate[] employee benefit structures or their administration," 115 S. Ct. at 1678, or impose any "substantive coverage requirement binding plan administrators," *id.* at 1681. While

the tax might cause the Fund's cost of providing hospital care to vary across state lines, that difference does not interfere with its ability to administer the plan uniformly on a multistate basis, *id.* at 1677-1678, and in any event, cost uniformity is not an object of ERISA preemption, *id.* at 1680. Nor is the economic effect of the tax so "acute" that it forces the Fund to "adopt a certain scheme of substantive coverage" or "effectively restrict[s] its choice" in the manner of providing benefits. *Id.* at 1681, 1683.[10] Thus, the HFA exhibits none of the characteristics of a state law that *Travelers* identified as warranting preemption.

We acknowledge that the Court in *Travelers* referred to New York's surcharge statutes in terms of their "indirect economic influence" on plan choices. 115 S. Ct. at 1679. But that was because the only question before the Court in *Travelers* was whether the surcharges—which were not directly paid by plans—were preempted. This Court has not suggested that the "direct" or "indirect" nature of a state law's effect on ERISA plans is dispositive of

[10] Indeed, the HFA has *less* effect on ERISA plans than the surcharges at issue in *Travelers*; because the HFA is set at a uniform, low rate (unlike the surcharges in *Travelers*, which varied among different types of health-care coverage providers), it was not designed to and will not have any effect on the choices of purchasers of health care (including plans) regarding what kind of health care to obtain. Once again, it is only if the court of appeals' decision is permitted to stand that the HFA would have an effect on plan choice, since in that event the effect of the HFA would be to encourage plans to set up their own hospitals rather than to provide hospitalization benefits in facilities owned by others. See note 9, *supra*.



whether the law relates to plans.[11] See *e.g.*, *id.* at 1678-1681. Moreover, while *Travelers* held that surcharge laws having only an "indirect" influence on ERISA plans are not preempted, this Court has recognized that laws whose "effect is only indirect" may also relate to plans and be preempted. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. at 139; accord *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981); see *Travelers*, 115 S. Ct. at 1683. By the same token, this Court has held that ERISA does not preempt a generally applicable state garnishment law even as it applies to "participants' benefits in the hands of an ERISA welfare benefit plan." *Travelers*, 115 S. Ct. at 1680 (describing *Mackey* v. *Lanier Collection Agency & Serv., Inc., supra).* Thus, whether ERISA preempts a state law depends not on characterization of the law's effect as direct or indirect, but on the actual nature of the impact of the law on ERISA plans.[12]

[11] Respondents mischaracterize (Br. in Opp. 6 n.4) the United States' position in *Travelers*. In urging that the indirect economic effects of the New York surcharges were insufficient for ERISA preemption, we expressed the broader view that "[a] state regulation does not relate to plans so long as its only effect is to subject all buyers in a broad-based market in which ERISA plans and others substantially participate to a single set of marketplace incentives." Brief for the United States as Amicus Curiae Supporting Petitioners at 9 in Nos. 93-1408, 93-1414 and 93-1415 (filed Nov. 15, 1994). The United States never contended, as respondents here suggest, that the preemption analysis turns solely on the indirect or direct nature of the regulatory impact.

[12] Respondents contend (Br. in Opp. 10-11 & n.7) that if the direct economic effect of the tax on ERISA plans is held to be insufficient for preemption, no state law will be preempted except those that mandate plan decisions. That contention is

2. The Second Circuit's ruling that ERISA preempts the HFA insofar as it applies to a plan-owned hospital conflicts with the Eighth Circuit's decision in *Boyle* v. *Anderson*, 68 F.3d 1093 (1995), cert. denied, 116 S. Ct. 1266 (1996). That case concerned a Minnesota law that imposed a 2% tax on the gross patient revenues of hospitals and other health care providers. 68 F.3d at 1097-1098. The statute permitted the providers to transfer the cost of the tax to third-party purchasers of health care services, a category that included self-insured ERISA health plans. *Id.* at 1098. Hospitals passed the tax through in the form of increased charges for services, an itemized charge on the hospital bill, or a separate bill. *Id.* at 1098, 1104. The statute expressly provided that purchasers of health care services must pay the passed-through tax, even if their contracts with health care providers did not provide for such payments. See Minn. Stat. § 295.582 (Supp. 1993) ("[a]ll third-party purchasers of health care services * * * must pay the transferred expense in addition to any payments due under existing or future contracts with the hospital" or health care provider). Therefore, where the providers

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incorrect. While an exhaustive list is not possible, this Court has made clear that a law that has an economic effect would be preempted if it targets ERISA plans, *e.g.*, *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U.S. 125, 128 (1992); *Mackey*, 486 U.S. at 830, or if a state law produces such an "acute" economic effect that it "force[s] an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict[s] its choice of insurers." *Travelers*, 115 S. Ct. at 1683. A state law would also be preempted if it dictates the administration of plan benefit structures, or frustrates the "nationally uniform administration of employee benefit plans," or "provid[es] alternate enforcement mechanisms" to those contained in ERISA. *Id.* at 1678.



elected to pass-through the tax to ERISA plans, the state statute directly imposed on those plans the legal requirement to pay it.

A number of self-insured ERISA welfare plans challenged the pass-through of the 2% tax to their plans. *Boyle*, 68 F.3d at 1097. The Eighth Circuit held that, notwithstanding the requirement that the ERISA plans themselves had to pay the tax, ERISA did not preempt the state tax law. *Id.* at 1110. The court noted that the law applied generally to purchasers of health care, regardless of whether they were ERISA plans. *Id.* at 1101. The court further observed that the tax did not "negate a plan provision," "contradict any provision of ERISA," "alter[] relationships among the primary ERISA entities," or "change[] the plan structure." *Ibid.* The court also determined that the tax did not "impose an extra administrative burden" on ERISA plans other than subjecting them to "a minor difference in cost of services among the states." *Id.* at 1104. Moreover, the court reasoned, the "economic impact" on an ERISA plan of a law that merely increases the plan's cost of doing business does not "suffice for a finding of preemption." *Id.* at 1105; see *id.* at 1109. The court thus concluded that the Minnesota tax had "only a tenuous, remote and peripheral affect on the plans," and was not preempted. *Id.* at 1110.

Like the Minnesota tax, New York's HFA is generally applicable to all "hospitals" and is entirely neutral with respect to ERISA plans. Neither tax favors or discriminates against plans, affects plan terms, interferes with eligibility or benefit determinations, or dictates plan structure. The taxes merely increase the cost of hospital care to plans and non-plans alike. Moreover, the liability of ERISA plans for

payment of the tax is the same under both statutes: The tax is payable by ERISA plans to the extent they fall within the neutral category of taxed entities.

Contrary to respondents' assertion (Br. in Opp. 12), the circuit conflict is not obviated by distinguishing between the "direct" and "indirect" economic impact of the tax on "targets." In neither case does the tax on hospital revenues target ERISA plans, although in both cases ERISA plans are legally obligated to pay it. Nor can respondents distinguish *Boyle* (see *ibid.*) on the ground that the Minnesota statute requires purchasers of health care to pay the transferred expense only "to the extent allowed by federal law." Minn. Stat. § 295.52 (Supp. 1993). The holding of the Eighth Circuit in *Boyle* was that federal law allows the direct imposition of the tax on health care purchasers, a conclusion directly contrary to the conclusion reached by the Second Circuit in this case.[13]

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[13] The Second Circuit's reasoning—that the HFA relates to an ERISA plan because it constitutes "an immediate tax on payments and contributions which were intended to pay for participants' medical benefits" (Pet. App. 4a)—is also in some tension with two decisions of the Sixth Circuit. That court held that a city ordinance and a state law that imposed taxes calculated on a basis that included employee or employer contributions for health and other benefits provided by ERISA plans were laws of general application that were not preempted by ERISA. *Thiokol Corp.* v. *Roberts*, 76 F.3d 751, 753, 755 (1996), petition for cert. pending, No. 95-1913 (filed May 23, 1996) (2.35% state tax imposed on business tax base that included employers' payments to ERISA plans); *Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550, 551, 554 (1987) (2% city tax imposed on earned income of city residents that included employee contributions for ERISA plan benefits); see also *Retirement Fund Trust of Plumbing, Heating and Piping Industry* v. *Franchise Tax Bd.*, 909 F.2d 1266 (9th Cir. 1990).



3. The issue in this case is of substantial importance. Under the Second Circuit's "direct economic impact" test, virtually every state law that taxes or regulates hospital care would be invalidated insofar as it applies to hospitals owned by ERISA-covered plans. For example, payment of generally applicable unemployment compensation taxes, payroll taxes, or real property taxes by a plan-owned hospital depletes plan assets at least as "directly" as payment of the provider tax at issue here. See *Boyle*, 68 F.3d at 1107; *Morgan Guar. Trust Co.* v. *Tax Appeals Tribunal*, 587 N.Y.S.2d 252 (N.Y. 1992) (ERISA preempts state tax on gain from property transfer when applied to transfer of plan-owned property). Similarly, state laws that impose quality control or workplace standards on hospitals have an impact on plans that own hospitals that is fully as "direct" as the impact of the provider tax. In both situations, the law's effect necessarily falls on the plan because the plan provides hospital care rather than purchasing it from "third party" providers in the marketplace. Indeed, if "directness" of a law's impact were the test of ERISA preemption, New York State's basic licensing laws could not survive, because they require "hospitals" to conform to state-approved systems of cost analysis, reporting and audits, and to maintain "premises, equipment, personnel, rules and by-laws, standards of medical care, and hospital service" that are "fit and adequate" according to state law.[14] N.Y. Pub. Health Law § 2805(1) and (2)(b) (McKinney 1993).

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[14] The breadth of the Second Circuit's decision is demonstrated by the court's decision to hold the HFA preempted as

Moreover, the court of appeals' reasoning leads to the conclusion that ERISA plans are exempt from a host of state laws that may tax or regulate the provision of other benefits and services that ERISA welfare plans provide rather than purchase. In addition to hospital and medical services, welfare benefits may include death benefits, day care services and prepaid legal services. 29 U.S.C. 1002(1); see 29 U.S.C. 186(c). Application of the court of appeals' "direct effect" test would invalidate, as applied to plan-owned service providers, state laws that tax client funds escrowed with attorneys, staffing requirements for day care centers, and embalming procedures for funeral homes. In short, the court of appeals' reasoning would lead to preemption of myriad state laws that constitute an otherwise valid exercise of a State's traditional police powers.

The principal teaching of *Travelers* is that "where federal law is said to bar state action in fields of traditional state regulation, [the Court has] worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 115 S. Ct. at 1676 (citations omitted). Health care regulation is such a field of traditional state regulation, as *Travelers* emphasized. *Id.* at 1680. Because of the posture of the case decided in

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to *all* receipts for patient care by the Fund's centers—even when the Fund is merely acting like any other hospital in providing services to patients that are *not* paid for out of Fund assets. Thus, under the Second Circuit's decision, even when the Fund's hospitals treat patients who are not beneficiaries of the Fund (such as members of the PPGU) or whose care is paid for by workers' compensation, the income from those activities is immune from the HFA.



*Travelers*, however, the Court addressed only the question of whether indirect economic effects on plans as a result of the imposition of a state law of general applicability are sufficient to trigger ERISA preemption, and held that they are not. This case presents the question of whether direct economic effects of a like nature also do not "relate to plans" within the meaning of ERISA Section 514(a). That important issue warrants resolution by the Court.

4. This case need not be held pending the Court's disposition of *California Div. of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, No. 95-789 (to be argued Nov. 5, 1996). *Dillingham* presents the question whether ERISA preempts a state law requiring contractors on state public works projects to pay prevailing journeyman wages to apprentices unless the apprentices are enrolled in state-approved programs. In our amicus brief in *Dillingham* (at 10-22), we argue that the state law is not preempted because the employer may choose whether to provide apprenticeship training through apprenticeship programs that are ERISA plans or through apprenticeship programs that are not. Since the state law does not distinguish between those two types of programs or otherwise encourage or discourage employers to employ one rather than the other, we argue that it relates to the field of apprenticeship training—a subject of traditional state regulation—and not to ERISA plans.

There is a surface similarity between this case and *Dillingham*. In both cases, one of the primary entities subject to ERISA (the employer in *Dillingham*, the NYSA-ILA plan here) decided to take action (establishing an apprenticeship program in *Dillingham*, operating a hospital here) in an area tradition-

ally subject to state regulation. The entity thereby became subject to state laws of general applicability (the prevailing wage scheme and its requirements for state approval for apprenticeship programs in *Dillingham*, the HFA in this case) that operate in the area. In both cases, we argue that that consequence is insufficient to trigger ERISA preemption.

Notwithstanding that similarity, however, this Court's decision in *Dillingham* is unlikely to affect the Second Circuit's disposition of this case. The Second Circuit made clear in its decision on remand that in its view the HFA is preempted because the tax applies directly to ERISA plans that own hospitals. See Pet. App. 3a ("there is no third party between the plan and the tax imposed pursuant to the HFA"). The Second Circuit recognized that this Court's decision in *Travelers* established that similar taxes that had only indirect effects on ERISA plans are not preempted. See *ibid.* In *Dillingham*, the state law at issue applies to employers, not directly to ERISA plans, by regulating the wages that employers pay to apprentices (some of whom are enrolled in ERISA apprenticeship plans) under state public works projects. Accordingly, the Court in *Dillingham* may have no occasion to address the distinction that was crucial to the Second Circuit's decision in this case: the one between laws that directly apply to ERISA plans and those that indirectly affect them.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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